

No. 295974

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER PEREZ, Appellant

---

APPEAL FROM THE SUPERIOR COURT  
OF GRANT COUNTY  
THE HONORABLE EVAN E. SPERLINE

---

OPENING BRIEF OF APPELLANT

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Marie J. Trombley, WSBA 41410  
Attorney for Appellant  
PO Box 28459  
Spokane, WA 99228  
509.939.3038

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I. ASSIGNMENTS OF ERROR

- A. The State's evidence was insufficient to sustain a conviction of attempting to elude a police vehicle.
- B. Mr. Perez was denied his constitutional right to effective assistance of counsel when his attorney failed to request a jury instruction on the statutory affirmative defense to attempting to elude a police vehicle.
- C. The trial court abused its discretion when it denied the motion for a new trial after having ex parte communication with a juror and failing to inform counsel until after the verdict was rendered.

*ISSUES PERTAINING TO ASSIGNMENTS OF ERROR*

- 1. Was the State's evidence insufficient to sustain a conviction for attempting to elude a police vehicle?
- 2. Did Mr. Perez receive ineffective assistance of counsel when defense counsel did not request a jury instruction on the statutory affirmative defense to attempting to elude a police vehicle?
- 3. Did the trial court abuse its discretion when it denied the motion for a new trial after having ex parte communication

with a juror and failing to inform counsel until after a verdict was rendered?

## II. STATEMENT OF FACTS

On June 8, 2010, at 4:13:35 p.m., Officer Brian Jones, traveling eastbound on Beacon Road in Moses Lake, observed Christopher Perez and his passengers traveling westbound in a Silver Honda. (Vol.1 RP 47; Vol.2 RP 106<sup>1</sup>). The officer drove an unmarked gray 2009 Ford Crown Victoria, without an external light bar or push bar. (Vol.1 RP 52; Vol.2 RP 102). Believing Mr. Perez's license was suspended, Officer Jones drove another two hundred feet and turned the patrol car around to follow Mr. Perez. (Vol.1 RP 48-49). The patrol car camera recorder showed it took 16 seconds for Officer Jones to turn his vehicle around. (Vol.2 RP 138).

Officer Jones testified he estimated Mr. Perez increased his speed from 25 miles per hour to at least 50 miles per hour at that point. (Vol.1 RP 54). There was one vehicle between the patrol car and Mr. Perez's car. (Vol. 1 RP 49). At 4:14:23 p.m., Officer Jones activated the patrol car lights and passed that vehicle. (Vol.1 RP 60; Vol.2 RP 105; 112). Mr. Perez's vehicle passed a pedestrian walking along the side of the road. As

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<sup>1</sup> For purposes of this brief, hearing date 10/20/2010 will be referred to as Vol. 1; 10/21/2010 as Vol.2; 10/22/2010 as Vol.3; 10/25/2010, 11/1/2010, 11/2/2010, 12/6/2010 as Vol. 4; and 11/9/2010 as Vol.5.

the officer's vehicle approached the pedestrian, Officer Jones briefly activated the siren. (Vol.1 RP 59-60). Still 200 yards back, at 4:14:26 p.m., Officer Jones noticed Mr. Perez's vehicle slow and then coast through a stop sign. (Vol.1 RP 60-61; Vol. 2 RP 115, 135). Mr. Perez drove the Silver Honda into the parking lot of the apartment complex owned by his father, and stopped. (Vol.1 RP 61). Officer Jones followed him into the parking lot approximately six to ten seconds later. (Vol.2 RP 119). A total of 40 seconds elapsed from the time Officer Jones completed the U-turn to when Mr. Perez brought his vehicle to a stop. (Vol.2 RP 139). Mr. Perez was arrested in the parking lot. (Vol.1 RP 63).

Defense counsel moved to dismiss based on insufficient evidence after the State rested. (Vol.2 RP 164). The court denied the motion. (Vol.2 RP 167).

Mr. Perez testified he did not know he was being signaled to stop by a police officer, and did not willfully fail to stop. (Vol.2 RP 207-208, 210). He acknowledged he likely drove over the speed limit, but stated the first time he was aware of the patrol car was when he saw it pull into the parking lot. (Vol.2 RP 208-09). He did not see the patrol car lights nor did he hear a siren when he was driving. (Vol.2 RP 211).

Mr. Perez was found guilty of attempting to elude a pursuing police vehicle and driving with a suspended license in the first degree.

(CP 24-25). Three days later, defense counsel brought to the court's attention that Mr. Perez informed her that one of the jurors knew Mr. Perez and his family. (Vol.4 RP 5). The court stated:

“All right. I'll want to make just a brief additional record. After--After the jury was empanelled, the bailiff mentioned to me that one of the jurors thought that he might be acquainted with Mr. Perez's father, and wasn't sure yet if it as the same family. And so the way I left it with the bailiff is that if the juror says anything further about that let me know, and he did not. So I assume the jury left it there. It's always a little bit iffy to filter conversations through the bailiff. The bailiff may not be telling me exactly what the juror said, and so on. But that was the – the extent of it.” (Vol.4 RP 4).

The court summoned the juror to appear for a hearing for further inquiry by the attorneys. (CP 27-28). During that hearing, the juror testified he remembered Mr. Perez and recognized Mr. Perez's mother during the first day of trial. (Vol.5 RP 6). The juror attended the same church as Mr. Perez's family and may have taught Mr. Perez either in high school or in a church class. (Vol.5 RP 7).

He further testified he “decided the best thing was to come early the next morning and tell the bailiff, and which I did. And he said that he would take it up with you, and I did not hear anything back. So I figured you felt that I could render a fair decision.” (Vol.5 RP 13). The juror also

remembered reading a police report about Mr. Perez. (Vol.5 RP 17-18). He did not think his acquaintance or knowledge of Mr. Perez affected his decision -making. (Vol.5 RP 14).

Defense counsel moved for a new trial on the basis that the defense was deprived of the opportunity to exercise a preemptory challenge with respect to the juror. (CP 29). The court denied the motion, finding that the juror had infrequent contact with Mr. Perez's family, could not recall any specific activity with Mr. Perez himself, and had forgotten what he read in a police report about Mr. Perez. (Vol.5 RP 18).

The matter proceeding to sentencing, at which time the court stated:

In the overall scheme of things the felony eluding in this case was not only at the bottom of the range of that offense but really kind of pushing the bottom. It involved recklessness in the form of some speed, as the officer began to give pursuit, and involved recklessness in running a stop sign immediately before stopping at the – apartment complex. (Vol.4 RP 24).

Mr. Perez appeals his conviction of attempting to elude a police vehicle.

### III. ARGUMENT

#### A. The State's Evidence Was Insufficient To Sustain The Conviction For Attempting To Elude A Police Vehicle.

The State is required to prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

1968, 25 L.Ed.2d 368 (1970); U.S.Const. Amend. XIV; Washington Constitution Article 1§3. In a challenge to the sufficiency of the evidence, the test is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). An essential element of a crime is one that must be proved to establish the illegality of the behavior. *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

To sustain a conviction of attempt to elude beyond a reasonable doubt, the State was required to prove that Mr. Perez *knew* he had been signaled to stop by a pursuing police vehicle *and* that he drove his car in a reckless manner *after* being given a visual or audible signal to stop. RCW 46.61.024(1); *State v. Stayton*, 39 Wn. App. 46, 49, 691 P.2d 596 (1984). The State did not meet its burden.

1. The evidence was insufficient to support the contention that Mr. Perez knew a police vehicle was pursuing him and that he willfully failed or refused to immediately stop his vehicle.

Mr. Perez argues the facts as presented at trial do not amount to substantial evidence, that is, evidence sufficient to convince “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227 (1980).

The question of whether or not there is substantial evidence is a question of law for the court. *State v. Zamora*, 6 Wn. App. 130, 133, 491 P.2d 1342 (1971).

The trial record established the following facts. Officer Jones was always at least between 200 feet and 200 yards behind Mr. Perez's car. The vehicle driven by Officer Jones was unmarked. It did not have an external light bar or front push bar. Officer Jones did not immediately activate his lights after turning his car around to follow Mr. Perez. (Vol.2 RP 105). There was a car between Officer Jones' vehicle and Mr. Perez's car when Officer Jones activated the emergency lights. (Vol.2 RP 105). The emergency siren was only briefly activated as the patrol car approached a pedestrian on the side of the road. Mr. Perez testified he did not see the police car behind him, did not hear the siren, nor did he see the emergency lights. The entire "pursuit" lasted 40 seconds, from 4:13:47 to 4:14:14:31 p.m.

The willful failure or refusal to stop implies knowledge that a signal had been given. *State v. Duffy*, 86 Wn. App. 334, 340, 936 P.2d 444 (1997). Willfulness in this context is identical with knowledge. *State v. Mather*, 28 Wn. App. 700, 702, 626 P.2d 44 (1981). Here, even viewed in a light most favorable to the prosecution, the facts do not substantiate the contention that Mr. Perez was even aware the officer signaled him to stop.

Further, without knowledge a signal had been given, no rational trier of fact could have found the essential element of willful failure or refusal to stop beyond a reasonable doubt. *Jackson v Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

2. Mr. Perez did not drive in a reckless manner in an attempt to elude a police vehicle.

To violate the attempt to elude statute, a driver must know he has been directed by a law enforcement officer to stop his vehicle, must willfully fail to stop, and must drive in a reckless manner while attempting to elude a pursuing police vehicle. RCW 46.61.024(1). “Reckless manner” means “driving in a rash or heedless manner, indifferent to the consequences.” *State v. Roggenkamp*, 153 Wn.2d. 614, 621-22, 106 P.3d 196 (2005).

Here, the officer estimated Mr. Perez sped up from driving 25 miles per hour at 4:13:31 p.m. At 4:13:47, the officer estimated he was driving 50 miles per hour. (Vol.2 RP 105). The officer was not pursuing Mr. Perez during those seconds; he was making a U-turn in the road.

After 4:13:47 the officer estimated Mr. Perez’s speed increased to about 65 miles per hour, but 36 seconds later, at 4:14:23 pm, he was no longer speeding. (Vol.1 RP 53; Vol.2 RP 112-113). Officer Jones did not activate his lights *until* 4:14:23 p.m. Mr. Perez slowed and coasted through a stop sign at 4:14:26 p.m. He stopped in the parking lot

approximately 5 to 8 seconds later. Mr. Perez's driving does not rise to the level of driving in a reckless manner.

This court analyzed whether there was sufficient evidence for a jury to conclude a defendant drove in a rash or heedless manner, indifferent to the consequences when he attempted to elude police, in *State v. Young*, 158 Wn. App. 707, 243 P.3d 172 (2010). There, the defendant drove at excessive speeds, swerved in and out of traffic, ran stop signs and red lights and drove into oncoming traffic. *Id.* at 724.

Here, with the exception of the one car between Mr. Perez and Officer Jones, the roads were empty. Mr. Perez did not drive erratically, weave through traffic, or leave the roadway. The officer testified that children at the apartment complex took evasive action when Mr. Perez drove into the parking lot; however, the evidence from the patrol car videotape actually showed the children moved *after* the *patrol car* entered the parking lot. Mr. Perez was not driving at that time. (Vol.2 RP 121-22).

While it is evident Mr. Perez had likely gone over the speed limit, his action of speeding at different points in the 40 second span does not rise to the level of driving in a reckless manner as defined in *Roggenkamp* or as applied in *Young*.

Further, the trial court recognized the insufficiency of the State's evidence when it commented:

In the overall scheme of things the felony eluding in this case was not only at the bottom of the range of that offense but *really kind of pushing the bottom*. It involved recklessness in the form of some speed, as the officer began to give pursuit, and involved recklessness in running a stop sign immediately before stopping at the – apartment complex. (Vol. 4 RP 24). (Emphasis added).

This court should reverse the conviction based on an insufficiency of evidence. The remedy is dismissal of the charge with prejudice. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

B. Mr. Perez Did Not Receive Effective Assistance Of Counsel When Counsel Failed To Request A Jury Instruction On The Statutory Affirmative Defense to Attempting To Elude A Police Vehicle.

Mr. Perez presented the defense that in the 40 seconds he was followed by Officer Jones he did not know he had been signaled to stop, and thus did not willfully fail to stop or drive in a reckless manner in an attempt to elude the police vehicle. (See Argument A above). Under RCW 46.61.024(2),

“It is an affirmative defense...which must be proved by a preponderance of the evidence that (a) a reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances.”

The Sixth Amendment to the U.S. Constitution, and Article 1 §22 of the Washington Constitution guarantee the right to assistance of counsel. Such assistance must be effective. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A claim of ineffective assistance of counsel is reviewed *de novo*. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

To establish ineffective assistance of counsel, Mr. Perez must demonstrate both deficient performance and resultant prejudice because of deficient performance. *Strickland*, 466 U.S. at 687. Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel. *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007).

To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, the reviewing court analyzes three factors: (1) whether the defendant was entitled to the instruction; (2) whether the failure to request the instruction was a strategy or tactic; (3) whether the failure to offer the instruction prejudiced the defendant. *See State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009).

A defendant is entitled to have his theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence in the record. *State v. Griffith*, 91 Wn.2d 572, 574,

589 P.2d 799 (1979). Further, in determining whether substantial evidence has been offered, the court reviews the entire record in a light most favorable to the defendant. *State v. Williams*, 93 Wn. App. 340, 348, 968 P.2d 26 (1998). Here, there is no question substantial evidence supported Mr. Perez's theory of the case. (See Argument A above). In fact, the court itself commented at sentencing that the felony eluding conviction "was not only at the bottom of the range of that offense but *really kind of pushing the bottom.*" An instruction concerning the statutory defense would have been given if it had been offered to the court.

When there is sufficient evidence to support an instruction on a statutory affirmative defense, and counsel fails to request the instruction, counsel's performance is deficient, that is, it has fallen below an objective standard of reasonableness. *In re Hubert*, 138 Wn. App. at 924; *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 532 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). Courts have found trial counsel ineffective for failure to propose jury instructions which correctly state the law and to which the defendant was entitled. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) (Counsel did not request an instruction on diminished capacity, even though there was sufficient evidence the defendant had been consuming alcohol); *In re Hubert*, 138 Wn. App. at 929-930 (Defense counsel's performance deficient for failure

to propose the statutory “reasonable belief” defense to rape when there was evidence to support the instruction).

In *Powell*, it appeared that trial counsel was aware of the statutory affirmative defense, and failed to request it. *Powell*, 150 Wn. App. at 155. The court noted the evidence supported the “reasonable belief” instruction; defense counsel argued the statutory defense, and the statutory defense was entirely consistent with the defendant’s theory of the case. *Id.*

The same can be said here. It was clear from the evidence that Mr. Perez’s defense was that he was unaware there was a police vehicle signaling him to stop, which was consistent with the statutory affirmative defense. Given the facts of this case, defense counsel’s failure to propose the instruction was not a strategy or tactic. It was deficient performance. The deficient performance prejudiced and denied Mr. Perez a fair trial; counsel failed to identify and present the sole available defense to the charged crime, despite sufficient evidence. *See In re Hubert*, at 932.

The to-convict instruction directed the jury to convict if it found beyond a reasonable doubt that (1) on or about June 8, 2010, the defendant drove a motor vehicle; (2) that the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren; (3) that the signaling police officer’s vehicle was equipped with lights or siren; (4) that the defendant willfully failed to refused to immediately bring his

vehicle to a stop after being signaled to stop; (4) that while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; (6) that the acts occurred in the State of Washington. (CP 18).

Without instruction on the statutory defense, the jury was obligated to convict Mr. Perez if they believed the officer had signaled and Mr. Perez did not immediately bring his vehicle to a stop. Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. *State v. Reichenbach*, 153 Wn.2d 126 130, 101 P.3d 80 (2004). The jury had no way of acquitting Mr. Perez if they believed a reasonable person would not have understood he had been signaled to stop by an officer. Mr. Perez was prejudiced by defense counsel's deficient performance.

C. The Trial Court Abused Its Discretion When It Denied A Motion For A New Trial After Engaging In Ex Parte Communication With A Juror.

The grant or denial of a motion for a new trial is within the discretion of the trial court. *State v. Jackson*, 113 Wn.2d 772, 777, 783 P.2d 580 (1980). On review, a trial court's discretion will be disturbed only for abuse of discretion. *State v. Bartholomew*, 98 Wn.2d 173, 211, 654 P.2d 1170 (1982), *overruled on other grounds*, 34 F.3d 879 (9<sup>th</sup> Cir.

1994). A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

At trial, defense counsel made a motion for a new trial because the defense was deprived of the opportunity to exercise a peremptory challenge with respect to a particular juror. On appeal, Mr. Perez argues the trial court should have granted his motion for a new trial because the court had *ex parte* communication with that particular juror without informing all parties until after the verdict, and the error was not harmless. An improper communication between the court and the jury is an error of constitutional dimension. *State v. Rice*, 110 Wn.2d 577, 613, 757 P.2d 889 (1988).

Generally, a trial court should not communicate with the jury in the absence of the defendant. *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). The term *ex parte* communication applies to communications made by or to a judge, during a proceeding, regarding that proceeding, without notice to a party. *State v. Bourgeois*, 133 Wn.2d 389, 407-08, 945 p.2d 1120 (1997).

In the eyes of the jury, the bailiff is an agent of the trial judge. *O'Brien v. City of Seattle*, 52 Wn.2d 543, 547-48, 327 P.2d 433 (1958). Here, a juror approached the bailiff on the morning of the second day of

trial and disclosed that he recognized and was acquainted with the defendant and his family. The bailiff reported this information to the trial court. The court, however, failed to notify counsel of this information. The communication was therefore improper.

It was not until the scheduled sentencing hearing, when the defense informed the court that Mr. Perez believed the juror knew Mr. Perez and his family, that the court made known the previous communication through the bailiff. Once the defendant raises the possibility of prejudice by an improper communication between the court and the jury, the burden is on the State to show the error was harmless beyond a reasonable doubt. *Caliguri*, 99 Wn.2d at 509.

Mr. Perez argues that had he known the juror knew and remembered his family from their church, and that the juror had previously read a police report about Mr. Perez, he would have had a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v Greenwood*, 464 U.S. 548, 553, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).

A criminal defendant has the fundamental right to be present at all critical stages of a trial. *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). Further, the jury selection process is a critical stage of a proceeding. *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds*

*sub nom*; *State v. Wilson*, 141 Wn. App. 597, 604, 171 P.3d 501 (2007).

Jury selection is the “primary means by which a court may enforce the right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant’s culpability.” *State v. Irby*, 170 Wn.2d 874, 884, 246 P.3d 796 (2011) (internal citations omitted).

In making its ruling on the denial of a new trial, the trial court focused its attention on the forthrightness and reputation of the juror, as well as its perceived minimal contact between the juror and the Perez family (Vol.4 RP 17-19). The court’s analysis was misplaced. Whether the court felt, after the fact, that the juror could render a fair and impartial decision was irrelevant: the issue was whether the defendant was deprived of the opportunity to make an informed decision and exercise his right to a jury free from possible prejudice. The court’s duty was to enforce Mr. Perez’s right to be tried by an impartial jury. Ignoring information brought to the trial judge by the bailiff, failing to inform counsel and the defendant of the information, and then determining the juror was impartial after the verdict was rendered was a violation of Mr. Perez’s due process rights.

A violation of due process rights is subject to a harmless error analysis. *Irby*, 170 Wn.2d at 886. The burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt. *Caliguri*, 99

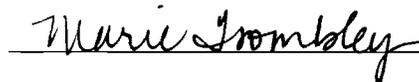
Wn.2d at 509. The State has not met its burden here. The State cannot show that Mr. Perez would not have excused the juror if he had been informed of the *ex parte* communication. Further, the State cannot show beyond a reasonable doubt that the juror's presence on the jury had no effect on the verdict. The court here essentially made a selection of a juror outside the presence of Mr. Perez. Mr. Perez's due process rights were violated and the error was not harmless.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Perez respectfully requests that this Court reverse his conviction and dismiss the charges with prejudice.

Dated: April 15, 2011.

Respectfully submitted,



Marie Trombley, WSBA No. 41410  
Attorney for Appellant Christopher Perez